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Note – Efficient Proximate Cause: Is California Headed for a Katrina-Scale Disaster in the Same Leaky Boat?

Jacqueline Young

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Notes

Efficient Proximate Cause: Is California Headed for a Katrina-Scale Disaster in the Same Leaky Boat?

JACQUELINE YOUNG*

The threat of natural disaster looms each year over many states in the U.S. Although major disasters are, in that sense, predictable, they nevertheless strike without warning. The private insurance industry has proven incapable of absorbing the risk. Adding to the problem is the fact that the law, in many states, allows insurance companies to skirt around disaster coverage by inserting anti-concurrent causation (“ACC”) clauses into their property insurance policies. Even in states where the law appears to bar such clauses, state programs aimed at increasing disaster insurance have failed to yield sufficient coverage to support the total amount in claims that would be produced following another Katrina-scale event. The extensive privation following Hurricane Katrina is proof-positive that America is not yet equipped to deal with large-scale natural catastrophe. Unfortunately, while the federal government can and does become the de facto “insurance plan” for all disaster-prone states, its response to past episodes has been ad hoc, at best.

This Note examines the concurrent causation question and takes a close look at the courts’ troubling treatment of ACC language following Hurricane Katrina. It goes on to contrast the state of the law in the Gulf region with that of California, arguing that while California seems to have established a bright-line rule barring ACC clauses, recent decisions have brought the integrity of this rule into question. While California’s approach to the concurrent causation question could produce a workable solution for other disaster-prone states to observe, the California courts must first revitalize the rule barring ACC clauses, and the state must develop a solution to encourage more homeowners to purchase catastrophe insurance. Finally, the Note proposes a two-pronged solution, advocating both a judicial response, as well as the reintroduction of the Homeowners’ Defense Act of 2009. By enacting the Homeowners’ Defense Act, the federal government can take a proactive, instead of reactive, approach to natural disaster relief.

* J.D. Candidate, University of California, Hastings College of the Law, 2011. I would like to thank Professor Leo Martinez for his patience and guidance throughout this process. I would also like to thank Sara Tosdal and the staff of the *Hastings Law Journal* for their hard work and camaraderie. This Note is dedicated to my husband Eric Young, who has been a stalwart companion throughout law school, and to our family for all the love and support.

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INTRODUCTION

Hurricane Katrina caught the entire country off guard. After the waters receded, a so-called “second storm” erupted in the courts and in the media.¹ Katrina exposed significant weaknesses in insurance causation jurisprudence in the Gulf States and serves as an unfortunate warning to other disaster-prone states. By comparison, California seems prepared for a major catastrophe, defined for these purposes as a 250-year earthquake event.² In fact, California’s plan might be considered a

1. David P. Rossmiller, *Interpretation and Enforcement of Anti-Concurrent Policy Language in Hurricane Katrina Cases and Beyond*, in NEW APPLEMAN ON INSURANCE: CURRENT CRITICAL ISSUES IN INSURANCE LAW 43, 46, 64 (2007).

2. *Approaches to Mitigating and Managing Natural Catastrophe Risk: H.R. 2555, The Homeowners’ Defense Act: Joint Hearing on H.R. 2555 Before the Subcomm. on Hous. and Cmty. Opportunity and the Subcomm. on Capital Mkts., Ins. and Gov’t Sponsored Enters. of the H. Comm. on Fin. Servs.*, 111 Cong. 12–14 (2010) [hereinafter *Hearings*] (testimony of Glenn Pomeroy, Chief Exec. Officer, Cal. Earthquake Auth.); Barbara Bowers, *Funding the Inevitable*, BEST’S REV., Feb. 2005, at 21, 24.

workable option for other disaster-prone states—an example to follow. But California homeowners are not as secure as they appear. As only twelve-to-thirteen percent of California homeowners have purchased the earthquake insurance coverage they need to protect their homes from catastrophic loss,³ the danger of a catastrophic earthquake to homeowners is readily apparent. This Note traces California's approach to concurrent causation, arguing that it may be exemplary with added judicial and legislative support. This Note seeks to answer: How can California avoid a massive federal bailout and the arresting results of a Katrina-scale disaster?

Part I will give a brief background on first-party property insurance policies as relates to the causation question, the efficient proximate cause doctrine, and anti-concurrent clauses. Part II will take a closer look at the legal maelstrom that followed Katrina and will juxtapose it with California's approach to causation, revealing that while it has been often presumed that California draws bright-line rules on the concurrent causation question, recent case law suggests that the bright line is fading. Part II will further argue that California homeowners, even those with homeowner's insurance, are exposed to a significant amount of uninsured risk following a major earthquake.

Finally, Part III will attempt to solve these problems by proposing a multilayered solution. At the judicial level, the California courts should strictly curtail the effect of recent decisions that undermine California's approach to concurrent causation. At the legislative level, representatives should reintroduce and Congress should adopt the Homeowners' Defense Act of 2009⁴ ("HDA"), a federal disaster relief solution that had been under consideration in the previous term.⁵ This approach may well be a workable example for other disaster-prone states to follow.

3. See *Hearings*, *supra* note 2, at 13; see also Bowers, *supra* note 2.

4. H.R. 2555 [111th]: *Homeowners' Defense Act of 2010*, GovTRACK.US, <http://www.govtrack.us/congress/bill.xpd?bill=h111-2555> (last visited Feb. 2, 2011) [hereinafter *Homeowners' Defense Act of 2010*]. Although the HDA was introduced in 2009, it remained under consideration throughout 2010 and is sometimes referred to as the Homeowners' Defense Act of 2010. See, e.g., *id.* Because many sources refer to it by its 2009 title, and for the purposes of consistency, I will refer to it only as the Homeowners' Defense Act of 2009. At the time this Note went to print, the HAD had not yet been reintroduced in Congress's 112th Term, see *id.*, and although this Note argues that it ought to be reintroduced, the solution this Note proposes is not dependent upon the HDA. The larger goal is to urge a federal disaster insurance scheme, and while the HDA is the most promising option currently available, other similarly well-conceived federal schemes would be equally applicable.

5. H.R. 2555, 111th Cong. (2009).

I. THE TANGLED WEB OF INSURANCE CAUSATION

In contrast to named-peril policies,⁶ all-risk policies cover all losses to a property *unless* the cause of the loss is expressly excluded by the policy terms.⁷ While the determination of whether coverage applies to a loss resulting from single or multiple causes is typically straightforward, problems arise when a loss results from multiple causes, one of which is excluded under the policy. Suppose, for example, a policy covers rain damage but not mudslide. What happens when a home is destroyed by a mudslide caused by heavy rain? Is the mudslide the culprit, or is the rain? What about when two independent but simultaneous causes destroy property, such as a plane crash occurring at the same instant as a mudslide?

A. THE EFFICIENT PROXIMATE CAUSE DOCTRINE

The prevailing approach for analyzing causation issues in first-party property insurance coverage cases has been the efficient proximate cause (“EPC”) doctrine.⁸ Under this doctrine, recovery is generally permitted “for a loss caused by a combination of a covered risk and an excluded risk only if the covered risk was the efficient proximate cause of the loss.”⁹ Depending upon the jurisdiction, the EPC might be defined as the “predominant” or most important cause in the chain of events,¹⁰ or alternatively, as the “prime” or “moving” cause¹¹ of the loss: the cause that “set the chain of events in motion.”¹² There are nearly as many interpretations of the doctrine as there are jurisdictions to apply it, and the courts have utterly failed to reach a consensus.¹³ This lack of uniformity leaves insurer and insured alike in an untoward state of uncertainty.¹⁴ As a result, at least three states, including Florida,

6. A named-peril, or “specified-risk,” policy is one that covers loss to the named property only if the loss resulted from any of the specifically identified risks in the policy. ROBERT H. JERRY, II & DOUGLAS R. RICHMOND, *UNDERSTANDING INSURANCE LAW* 391 (4th ed. 2007); Roy C. McCullough, *Property Insurance*, 1963 *INS. L.J.* 75, 84.

7. JERRY & RICHMOND, *supra* note 6.

8. At least thirty-five states employ some version of the EPC doctrine in first-party property cases. Michael C. Phillips & Lisa L. Coplen, *Concurrent Causation Versus Efficient Proximate Cause in First-Party Property Insurance Coverage Analysis*, 36 *BRIEF* 32, 33, 35–39 (Winter 2007). For an interesting discussion on the history and development of the doctrine, see Julie A. Passa, Comment, *Insurance Law—Property Insurance: Adopting the Efficient Proximate Cause Doctrine, But Saying No to Contracting Out of It*, 79 *N.D. L. REV.* 561, 564–72 (2003).

9. 7 LEE R. RUSS & THOMAS F. SEGALLA, *COUCH ON INSURANCE* § 101:55 (3d ed. 2005).

10. *See, e.g.*, *Garvey v. State Farm Fire & Cas. Co.*, 770 P.2d 704, 707 (Cal. 1989).

11. *See, e.g., id.* at 708.

12. 7 RUSS & SEGALLA, *supra* note 9, § 101:45.

13. *Id.* § 101:43.

14. Joseph Lavitt, *The Doctrine of Efficient Proximate Cause, the Katrina Disaster, Prosser’s Folly, and the Third Restatement of Torts: Cracking the Conundrum*, 54 *LOU. L. REV.* 1, 6–7 (2008); *see also* Michael E. Bragg, *Concurrent Causation and the Art of Policy Drafting: New Perils for Property*

Minnesota, and Wisconsin, have expressly rejected the doctrine, and insurers have incorporated “anti-concurrent cause” language into their policies to replace the EPC analysis.¹⁵

Complicating matters further, the doctrine applies in situations where multiple causes occur in a causal chain,¹⁶ but it does not apply in situations where completely independent causes simultaneously produce an indivisible loss,¹⁷ as in the airplane/mudslide example above. At common law, where two independent, concurrent causes act to produce a loss, the insurer need only cover the part of the damage proven to have resulted from the covered causes.¹⁸ The common law approach is unsatisfying, because it may be difficult to distinguish which damage resulted from a covered cause in a particular case, and the insured may not receive the full amount of coverage for which they bargained and paid premiums.

A small number of jurisdictions have dealt with this problem by adopting a more liberal approach: the concurrent causation doctrine.¹⁹ This approach applies a “but for” analysis similar to that in tort law.²⁰ Under the concurrent causation doctrine, a loss would be wholly covered if it “would not have occurred but for the contribution of a covered” peril.²¹ In other words, the loss is covered as long as at least one cause, whether independent or dependent, meaningfully contributed to the loss and was a covered peril.²²

B. ANTI-CONCURRENT CAUSE CLAUSE LANGUAGE

In order to shift the causation analysis in their favor, insurers have recently developed anti-concurrent cause (“ACC”) clauses that attempt to override the EPC doctrine, to strengthen the control of the contract language, and to prevent coverage for claims not anticipated when the policies were created.²³ Developments in the California courts, in cases such as *Sabella v. Wisler*,²⁴ *State Farm Mutual Automobile Insurance Co.*

Insurers, 20 FORUM 385, 388–89 (1985) (explaining that the decisions of the California courts, in particular, have caused a great deal of uncertainty for insurers, as they have used the efficient proximate cause doctrine to create “new ‘causes’ of loss never contemplated by property insurance policy drafters”).

15. Lavitt, *supra* note 14, at 16–17 & n.73.

16. 7 RUSS & SEGALLA, *supra* note 9, § 101:55.

17. *Id.*

18. *Id.* § 101:49.

19. See Phillips & Coplen, *supra* note 8, at 35–39 (listing seven states as employing a concurrent causation analysis and two states as “uncertain”).

20. *Id.* at 34.

21. *Id.*

22. *Id.* at 33–34.

23. Rossmiller, *supra* note 1, at 55.

24. 377 P.2d 889 (Cal. 1963).

v. Partridge,²⁵ and *Garvey v. State Farm Fire & Casualty Co.*,²⁶ prompted the new language. These opinions broadened the scope of coverage far past what policy drafters had intended.²⁷ The primary problem was that, unlike small-scale, individual losses that could be anticipated using the “law of large numbers,”²⁸ large-scale catastrophic losses—caused by, for example, hurricane, flood, or earthquake—“are difficult for insurers to handle. . . . With this kind of loss, insurers lose the benefit of certainty and predictability in actuarial calculations, and face potential losses that may possibly exceed their resources.”²⁹ As a result, catastrophic losses have been excluded from coverage in typical homeowner’s policies for quite some time.³⁰ The California cases threatened that safety net, and insurers feared that the courts would refuse to respect the exclusionary language of their policies, finding coverage beyond the insurers’ intent.³¹

Because the EPC analysis is merely a “default rule” in many jurisdictions, approximately twenty states have allowed insurers to contract around it, replacing it with ACC policy language intended to override the analysis, or at least to eliminate certain unfavorable outcomes.³² However, because of the potential for harsh results, four states have refused to give effect to ACC clause language.³³ Notably, California has historically been considered one of those states.³⁴ In the states that do give ACC clauses effect, a typical clause drafted by the Insurance Services Office (“ISO”) might read:

1. We do not cover loss to any property resulting directly or indirectly from any of the following. Such a loss is excluded even if another peril or event contributed concurrently or in any sequence to cause the loss.

....

(b) Water or damage caused by water-borne material. Loss resulting from water or water-borne material damage described below is not covered even if other perils contributed, directly or indirectly to cause the loss. Water and water-borne material damages means:

25. 514 P.2d 123 (Cal. 1973).

26. 770 P.2d 704 (Cal. 1989); Bragg, *supra* note 14, at 388–89.

27. Bragg, *supra* note 14, at 388–89.

28. See Rossmiller, *supra* note 1, at 53 (“[W]hen large numbers of independent losses can be measured, the average loss becomes relatively easy to calculate, or in other words, there is great statistical confidence that any one actual loss will not deviate from the overall loss calculation to a degree that it places insurers’ financial solvency in jeopardy.”).

29. *Id.* at 53–54 (footnote omitted); see RICHARD V. ERICSON & AARON DOYLE, UNCERTAIN BUSINESS: RISK, INSURANCE, AND THE LIMITS OF KNOWLEDGE 180–84 (2004) (describing the difficulties in collecting reliable data on earthquakes and the subjectivity of any data that may be collected).

30. Rossmiller, *supra* note 1, at 54.

31. *Id.* at 59–60 (citing Bragg, *supra* note 14).

32. *Id.* at 57–58.

33. See Phillips & Coplen, *supra* note 8 (listing California, North Dakota, Washington, and West Virginia as having refused to implement the policy language).

34. *Id.* But see discussion *infra* Part II.B (explaining that this refusal may be wavering in California).

(1) flood, surface water, waves, tidal waves, overflow of a body of water, spray from these, whether or not driven by wind.³⁵

The aim of this clause is, ostensibly, to remove the possibility that the insurer will be required to cover any water damage whatsoever, even if the EPC of the damage was some other covered force, say wind. But the danger of this drafting lies in the word “concurrently.” Courts could interpret the term “concurrently” in this context to mean that no loss shall be covered so long as water was a contributing force when any damage occurred. In fact, in *Leonard v. Nationwide Mutual Insurance Co.*, Judge Senter interpreted the clause in this fashion and proceeded to strike it down as ambiguous,³⁶ explaining that, read literally, such phrasing would bar recovery for massive wind damage where even nominal water damage occurred at or near the same time.³⁷

Some ACC clauses are even broader and more restrictive of coverage than the ISO language above. Compare that language with the following ACC clause developed by State Farm:

2. We do not insure under any coverage for any loss which would not have occurred in the absence of one or more of the following excluded events. We do not insure for such loss regardless of: (a) the cause of the excluded event; or (b) other causes of the loss; or (c) whether other causes acted concurrently or in any sequence with the excluded event to produce the loss; or (d) whether the event occurs suddenly or gradually, involves isolated or widespread damage, arises from natural or external forces, or occurs as a result of any combination of these.

....

c. Water Damage, meaning

(1) flood, surface water, waves, tidal water, tsunami, seiche, overflow of a body of water, or spray from any of these, all whether driven by wind or not³⁸

This language may be seen as the broadest example of ACC language, as it applies a “but for” analysis to causation.³⁹ The “but for” analysis completely overrides the EPC doctrine: Recovery for a loss is barred so long as an excluded cause was a necessary element in the chain of events leading to the loss, regardless of whether the excluded cause

35. *Leonard v. Nationwide Mut. Ins. Co.*, 438 F. Supp. 2d 684, 688–89 (S.D. Miss. 2006), *aff’d but criticized by* 499 F.3d 419, 430 (5th Cir. 2007); see Tim Ryles, “Anticoncurrent Causation” Refined by Mississippi Supreme Court, IRMI.COM, <http://www.irmi.com/expert/articles/2010/ryles04-personal-lines-insurance.aspx> (last visited Feb. 2, 2011).

36. *Id.* at 693. Note that although Judge Senter’s reasoning on this point was later criticized by the Fifth Circuit, see *Leonard*, 499 F.3d at 430, it nevertheless serves as a cautionary example of how ACC language may appear ambiguous.

37. *Leonard*, 438 F. Supp. 2d at 694.

38. *Tuepker v. State Farm Fire & Cas. Co.*, 507 F.3d 346, 351 (5th Cir. 2007).

39. Rossmler, *supra* note 1, at 63–64.

was the initiating cause, the immediately-preceding cause, or something in between.⁴⁰

II. CATASTROPHE IN CALIFORNIA AND THE COASTAL STATES: IS ANYONE PREPARED?

Part I provided a general background on the efficient proximate cause doctrine and anti-concurrent cause language. Part II will briefly focus on the state of the EPC doctrine and the role of ACC language in post-Katrina litigation. Using Hurricane Katrina as a snapshot, I will then contrast these results with the current state of California law, exposing potential pitfalls.

A. IN THE AFTERMATH OF KATRINA

Hurricane Katrina slammed into the Gulf Coast in August 2005, killing approximately 1600 people and causing \$135 billion in damage.⁴¹ But the storm was just the beginning; the insurance industry immediately began implementing tactics to limit its exposure, denying coverage in many cases by claiming that the losses were unrelated to wind—a covered cause in standard homeowner's policies—and were caused by water—an excluded cause in standard homeowner's policies.⁴² Some companies even resorted to fraud in an attempt to limit payouts, coercing engineers to "re-evaluate" damage to homes when initial reports revealed damage from covered causes.⁴³ By 2007, the Louisiana Department of Insurance estimated it had received over 9000 consumer complaints and requests for aid in resolving benefits disputes with insurance companies.⁴⁴ Insurance claims were valued at approximately \$60 billion by 2006.⁴⁵

What gave the insurance companies such security in denying claims? Arguably, they were able to take advantage of the hopelessly confused state of the law regarding the EPC doctrine in the coastal states.⁴⁶ Insurers of property damaged by Katrina could invoke the ACC clauses in their standard homeowner's policies in an attempt to deny coverage.⁴⁷

40. *Id.*

41. AM. ASS'N FOR JUSTICE, PATTERN OF GREED 2007: HOW INSURANCE COMPANIES PUT PROFITS OVER POLICYHOLDERS 3 (2007).

42. *Id.* at 2.

43. *Id.* at 5–6.

44. *Id.* at 4.

45. Spencer M. Taylor, *Insuring Against the Natural Catastrophe After Katrina*, 20 NAT. RESOURCES & ENV'T 26, 26 (2006).

46. See Lavitt, *supra* note 14, at 31–32 (suggesting that while the "ever-shifting and sometimes nonsensical judgments" addressing concurrent causation have created confusion for policyholders and insurers alike, insurers have been able to "push the envelope," because they have the distinct advantage of being able to afford to wait out judicial trends).

47. Rhonda D. Orin, *First-Party Coverage for Catastrophic Risks: Part I—Personal Lines*, in

It stands to reason that unlike homeowners, who were desperate to rebuild their lives, the insurance industry had little to lose and everything to gain by stalling. Insurers had the luxury of waiting to see what color smoke would rise out of the judicial chimney. Inconsistency and uncertainty in the law thus demonstrably leads to significant hardships, the brunt of which falls on insureds' shoulders in times of crisis.

I. Mississippi: The Smoke Keeps Changing Colors

The seesawing of court judgments in Katrina litigation has been stunning. Cases from the Mississippi courts addressing ACC clauses are particularly illustrative. At the outset, the federal courts were compelled to examine the issue without guidance from the Mississippi Supreme Court, which did not weigh in until 2009.⁴⁸ The complications began with two opposing lines of authority in Mississippi regarding whether the EPC doctrine had even been adopted.⁴⁹ Incredibly, despite the absence of a definitive agreement on this fundamental element, the federal courts had no trouble issuing decisions on whether ACC clauses could be used to circumvent the doctrine.⁵⁰

First, in *Tuepker v. State Farm Fire & Casualty Co.*, the Tuepkers' home was completely destroyed during Katrina, allegedly through a combination of wind, rain, and storm surge.⁵¹ State Farm denied their claim, citing the water damage exclusion in their policy.⁵² The policy also incorporated State Farm's broad "but for" ACC language, excluding all loss "which would not have occurred in the absence of" water damage.⁵³ Judge Senter, hearing State Farm's motion to dismiss in the district court, found that any damage directly attributable to water (including storm surge) was excluded under the policy.⁵⁴ Conversely, any damage caused by wind or wind-born objects was covered.⁵⁵ In response to State Farm's attempt to use the ACC clause to deny coverage for wind losses that would not have occurred "but for" water damage, Judge Senter held that

INSURANCE COVERAGE 2007, at 89, 93 (PLI Litig. & Admin. Practice, Course Handbook Ser. No. 758, 2007).

48. See *infra* text accompanying notes 67–77.

49. Compare *Grace v. Lititz Mut. Ins. Co.*, 257 So. 2d 217, 224 (Miss. 1972) (explaining that the question of proximate cause is one of fact for the jury, and that a showing "that wind was the proximate or efficient cause of the loss" will suffice), with *Rhoden v. State Farm Fire & Cas. Co.*, 32 F. Supp. 2d 907, 911 (S.D. Miss. 1998) ("Mississippi courts have not specifically adopted the efficient proximate cause doctrine . . .").

50. See Lavitt, *supra* note 14, at 18–20, 22 (explaining that although two opposing lines of authority had emerged in Mississippi, in the *Tuepker* case, Judge Senter simply ignored *Rhoden* and assumed, under *Grace*, that Mississippi had adopted the EPC doctrine).

51. No. 1:05CV559 LTS-JMR, 2006 WL 1442489, at *1 (S.D. Miss. May 24, 2006).

52. *Id.*

53. See *supra* text accompanying note 38.

54. *Tuepker*, 2006 WL 1442489, at *3.

55. *Id.*

the clause was ambiguous and unenforceable; so long as the plaintiffs could prove their loss was proximately caused by wind, such loss would be covered.⁵⁶

In *Leonard v. Nationwide Mutual Insurance Co.*, involving litigation of the narrower ISO version of ACC clause language,⁵⁷ the Leonards' home had not been completely destroyed by Katrina, but had sustained an estimated \$130,000 in damage.⁵⁸ At the district court level, Judge Senter found that, other than \$1200 worth of wind damage, Nationwide had met its burden of proving that the bulk of the damage had been caused by water, an excluded cause under the policy.⁵⁹ With regards to an ACC clause in the Leonard's homeowner's policy, Judge Senter again found the language ambiguous and unenforceable when read in conjunction with the coverage grant for wind, explaining that when read literally, the terms would exclude any damage where even de minimis concurrent water damage was involved.⁶⁰

On appeal in both cases, the Fifth Circuit changed course on the ACC clause issue. Hearing *Leonard* first, the court found, "Contrary to the district court's ruling, Nationwide's ACC clause is not ambiguous, nor does Mississippi law preempt the causation regime the clause applies to hurricane claims."⁶¹ In an "*Erie* guess,"⁶² the Fifth Circuit read Mississippi case law to indicate that the EPC doctrine was the default rule,⁶³ but that Mississippi law did not forbid the use of ACC clauses to circumvent that rule.⁶⁴ A few months later, the Fifth Circuit found in *Tuepker* that the broader language of State Farm's ACC clause was no more ambiguous in conjunction with the other clauses in the policy than was the ACC clause at issue in *Leonard*.⁶⁵ Relying on its decision in *Leonard*, the court held in *Tuepker* that the ACC clause was enforceable and had effectively overridden the EPC doctrine.⁶⁶

Finally, in *Corban v. United Services Automobile Ass'n*, the Mississippi Supreme Court weighed in on the subject.⁶⁷ There, the Corbans' home had been damaged to the estimated tune of \$1,607,926.⁶⁸ After sending an engineer to review the damage, United States

56. *Id.* at *5.

57. *See supra* note 35 and accompanying text.

58. *Leonard v. Nationwide Mut. Ins. Co.*, 438 F. Supp. 2d 684, 689–90 (S.D. Miss. 2006), *aff'd but criticized by* 499 F.3d 419, 430 (5th Cir. 2007); *see also supra* text accompanying note 35.

59. *Leonard*, 438 F. Supp. 2d at 696.

60. *Id.* at 694.

61. *Leonard v. Nationwide Mut. Ins. Co.*, 499 F.3d 419, 430 (5th Cir. 2007).

62. *Id.* at 431.

63. *Id.* at 431–32.

64. *Id.* at 436.

65. *Tuepker v. State Farm Fire & Cas. Co.*, 507 F.3d 346, 354–55 (5th Cir. 2007).

66. *Id.* at 356.

67. 20 So. 3d 601, 617–18 (Miss. 2009).

68. *Id.* at 606.

Automobile Association paid out \$83,903.77 for wind damage and \$350,000 under a separate flood policy, leaving \$1,174,022.23 in claims unpaid.⁶⁹ Predictably, it denied the remaining claimed amount under the water damage exclusion in the homeowner's policy.⁷⁰ Even more predictably, the homeowner's policy included the following ACC clause to water damage: "We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss."⁷¹ The court proceeded to reject the lower court's application of the Fifth Circuit's analysis, explaining that ACC clauses would only apply in the event that wind and water causes were "truly 'concurrent.'"⁷² In other words, the language would only be triggered when "wind and flood simultaneously converg[e] and operat[e] in conjunction to damage the property," thereby creating an "'indivisible' loss."⁷³ According to the court, this was not the case in *Corban*, where wind and water had acted independently.⁷⁴ Therefore, if wind loss occurred first and water loss followed, the insured must still be covered for any loss proven caused by wind.⁷⁵ Similarly, if water loss occurred first and wind loss after, the insured is covered for wind loss proven beyond the water loss.⁷⁶ Notably, the court admitted that under this assessment, the outcome would depend upon which party has the burden of proof.⁷⁷

As is clear from this parade of case law, courts have had difficulty applying concurrent causation analyses and ACC clauses. With no consensus, both insurers and insureds alike suffer.⁷⁸ Unfortunately, it is often the insured who bears the heaviest burden, as the insurance companies have the luxury of waiting to pay out claims until they are forced to do so by a ponderous legal system—a rare outcome indeed.⁷⁹

Such inequity leads to inevitable public outcry. Particularly in the wake of the damage and litigation spawned by Katrina, ACC clauses were attacked as contrary to public policy and as attempts to strip

69. *Id.* at 606–07.

70. *Id.* at 606.

71. *Id.* at 612 (emphasis omitted).

72. *Id.* at 618.

73. *Id.*

74. *Id.* at 616–17.

75. *Id.*

76. *Id.*

77. *Id.* at 618–19.

78. See, e.g., Erik S. Knutsen, *Confusion About Causation in Insurance: Solutions for Catastrophic Losses*, 61 ALA. L. REV. 957, 959–60, 979–81 (2010); Lavitt, *supra* note 14, at 32–33; Banks McDowell, *Causation in Contracts and Insurance*, 20 CONN. L. REV. 569, 585 (1988).

79. See *supra* notes 46–47 and accompanying text (explaining that after disaster strikes, insurers have every incentive to deny claims until a court declares that coverage existed, and that insureds suffer in the interim, as they often cannot begin to rebuild their lives until their claims are paid).

insureds of coverage for which they had dutifully paid premiums.⁸⁰ Against this tide, some scholars deem these concerns to be widely inflated.⁸¹ They argue that ACC language should not have come into the equation at all in many Katrina cases, as wind and water were two separate, nonconcurrent forces causing distinct damage to many homes.⁸² With the exception, perhaps, of the Mississippi Supreme Court, the courts have misapplied ACC language as a result of widespread misunderstanding of concurrent causation.⁸³ In any event, scholars opine, ACC clause language is likely to remain in insurance policies as “its fundamental underpinnings are contracts, and the reason-to-be of contracts is to provide predictable results.”⁸⁴

Whether or not ACC clause language was properly questioned in the Katrina cases, this commentary magnifies the larger issue: Courts frequently apply EPC and concurrent causation analyses erratically, leaving insurers and insureds forever guessing. But, as I will argue, California’s approach to the concurrent causation analysis can provide a solution to these problems.

2. *In the Absence of Insurance*

Without insurance companies, who foots the bill in the wake of a catastrophic event? In short, the federal and state governments do. After Katrina, the federal government dispatched the Federal Emergency Management Agency (FEMA), along with a massive federal bailout amounting to upwards of \$50 billion by 2008.⁸⁵ Unfortunately, most ad hoc federal aid programs are inefficient at best,⁸⁶ and even federal aid could not restore the status quo. Despite FEMA’s efforts to pick up the slack, insurance companies began doubling and tripling insurance rates, and some outright refused to issue new property insurance policies in the coastal region.⁸⁷

80. See *Inquiry into Insurance Claims Payment Processes in the Gulf Coast After the 2005 Hurricane: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Fin. Servs.*, 110th Cong. 10–15 (2007) (testimony of Jim Hood, Att’y Gen. of Miss.); Gene Taylor, *Hurricane Katrina Special Edition: Federal Insurance Reform After Katrina*, 77 Miss. L.J. 783, 784–90 (2008).

81. Rossmiller, *supra* note 1, at 83–84.

82. *Id.*

83. *Id.*

84. *Id.* at 84.

85. *FEMA Gulf Coast Recovery 3 Years Later*, FEMA (Aug. 26, 2008), <http://www.fema.gov/news/newsrelease.fema?id=45545>.

86. See JONATHAN ORSZAG & DOUG FONTAINE, AN ECONOMIC ASSESSMENT OF THE HOMEOWNERS’ DEFENSE ACT OF 2009 I (2009); Lavitt, *supra* note 14, at 46; Barack Obama, Op-Ed., *Spread Risk with National Disaster Fund*, ST. PETERSBURG TIMES (Sept. 7, 2008), <http://www.tampabay.com/opinion/essays/spread-risk-with-national-disaster-fund/798581>.

87. See, e.g., RAWLE O. KING, CONG. RESEARCH SERV., RL 33892, POST-KATRINA INSURANCE ISSUES SURROUNDING WATER DAMAGE EXCLUSIONS IN HOMEOWNERS’ INSURANCE POLICIES 3 (2007); Taylor, *supra* note 80, at 788; Kathy Chu, *Insurance Costs Become 3rd Storm*, USA TODAY, Apr. 3, 2007, at

The Mississippi legislature responded to the problem by utilizing a “Wind Pool”—property insurance of last resort for those in need.⁸⁸ The Pool purchases reinsurance from the global market at costly rates, requiring 398% and 268% premium increases on residential and commercial property policies respectively.⁸⁹ For a brief period, federal bailout money was allocated to help relieve the exorbitant costs of the Pool.⁹⁰ However, this was only a temporary solution,⁹¹ and aside from sponsoring bills calling for insurance reform and federal regulation,⁹² it remains to be seen how the Gulf Coast states will respond to the threat of Katrina-like events in the future.

Unfortunately, the insurance industry pullout following Katrina was unsurprising. The same sequence of events followed Hurricane Andrew in Florida in 1993. Both the insurance and reinsurance markets collapsed, and many insurers who did not go bankrupt simply abandoned the market.⁹³ Thus, the Florida legislature created the Florida Hurricane Catastrophe Fund (“FHCF”), which has been successful in some respects but is significantly overexposed.⁹⁴ For example, in 2008, the Florida State Senate released a report “indicat[ing] that the FHCF’s potential shortfall for 2009—that is, the difference between liquidity resources and potential obligations—could be as large as \$19 billion.”⁹⁵ As will be explained in greater detail, a prophylactic federal response to catastrophe insurance is the ultimate solution under these circumstances.

A1.

88. Taylor, *supra* note 80, at 788–89.

89. *Id.* at 789.

90. *Id.*

91. *Id.*

92. *See id.* at 789–90 (calling for support for two such bills, including the Insurance Industry Competition Act (H.R. 1081) and the Flood Insurance Reform and Modernization Act (H.R. 3121)); Homeowners’ Defense Act of 2007, H.R. 3355, 110th Cong. (2007) (modified and reintroduced as Homeowners’ Defense Act of 2009, H.R. 2555, 111th Cong. (2009)).

93. Adrian Sainz, *Ten Years After Hurricane Andrew, Effects Are Still Felt*, SUN-SENTINEL, Aug. 18, 2002, at 2, available at <http://www.sun-sentinel.com/sfl-1992-ap-mainstory.0.7290462.story>.

94. *See* ORSZAG & FONTAINE, *supra* note 86, at 14–15; Bowers, *supra* note 2, at 21–22; Obama, *supra* note 86.

95. ORSZAG & FONTAINE, *supra* note 86, at 15 & n.22 (“The FHCF relies on bonding authority as it builds up reserves to meet its obligations. The recognized potential shortfall is a product of the current economic environment and lack of available capital, combined with an expansion of the FHCF.”); *see also* Obama, *supra* note 86 (“To shore [the FHCF] up, Floridians—already facing a budget shortfall—are paying Warren Buffet a quarter of a billion dollars just for the option to borrow money if disaster strikes. And even then, the Cat Fund wouldn’t have enough to cover its estimated \$28-billion in exposure should a major hurricane hit.”).

B. THE EFFICIENT PROXIMATE CAUSE DOCTRINE IN CALIFORNIA:
HAS THE GOLDEN STATE ACHIEVED THE PERFECT BALANCE?

In many ways, California has been driving the EPC doctrine discussion. As previously discussed, the California courts' broadening of the doctrine did much to foster the uncertainty that led insurers to draft ACC policy language in the first place.⁹⁶ An overview of the pertinent California cases and statutes is necessary to understand the progression of the doctrine.

Unlike many other states, the EPC doctrine is actually codified in California Insurance Code sections 530 and 532.⁹⁷ A strict reading of the statutory language in each of these sections, however, reveals that they seem to conflict with one another. Section 530 reads:

An insurer is liable for a loss of which a peril insured against was the proximate cause, although a peril not contemplated by the contract may have been a remote cause of the loss; but he is not liable for a loss of which the peril insured against was only a remote cause.⁹⁸

By contrast, section 532 dictates that "[i]f a peril is specially excepted in a contract of insurance and there is a loss which would not have occurred *but for* such peril, such loss is thereby excepted even though the *immediate* cause of the loss was a peril which was not excepted."⁹⁹ The "but for" language in section 532 directly conflicts with section 530's notion of proximate cause, because under section 532, a peril would be excluded if it were a "but for" cause of the loss, even if the "immediate cause" of the loss was a covered peril. Given this confusion, in a case involving multiple causes where at least one is covered and one is excluded, which should win?

The California courts faced exactly this question in a series of cases beginning with *Sabella v. Wisler*¹⁰⁰ in 1963. In *Sabella*, the plaintiffs had purchased an all-risk homeowner's insurance policy with National Union Fire Insurance Company.¹⁰¹ Their policy excluded "loss . . . by . . . settling, cracking, shrinkage, or expansion of pavements, foundations, walls, floors, or ceilings; unless loss by . . . collapse of building ensues. . . ."¹⁰² Unfortunately, by 1959, the home had incurred a great deal of subsidence damage, sinking over seven inches in one area; although the foundations and walls had cracked, the home was left standing and was

96. See *supra* Part I.B.

97. CAL. INS. CODE §§ 530, 532 (West 2005).

98. *Id.* § 530.

99. *Id.* § 532 (emphasis added).

100. 377 P.2d 889 (Cal. 1963).

101. *Id.* at 891.

102. *Id.* at 891-92.

deemed “inhabitable.”¹⁰³ The trial court estimated the loss of value at approximately \$8000.¹⁰⁴

At first glance, this appears to be a clear case of subsidence loss excluded under the policy; however, the Sabellas argued that under section 530, the loss should be covered as the subsidence itself had been proximately caused by a leaky sewer pipe, negligently installed by the contractor (negligence was covered under the policy).¹⁰⁵ The insurer responded that under section 532, the loss should be excluded because the damage would not have occurred “but for” the settling.¹⁰⁶ Attempting to reconcile the two sections, the California Supreme Court explained that section 532 could not be read in such a way as to nullify section 530.¹⁰⁷ The “but for” language in section 532 necessarily corresponds to the proximate cause, so that when the EPC of a loss is excluded under the policy, the loss will not be covered.¹⁰⁸ The language of “immediate cause of the loss” corresponds only to the cause that was “immediate in time to the occurrence of the damage.”¹⁰⁹ Therefore, the court held, the loss must be attributed to the “efficient cause,” the cause that set the other events or causes in motion.¹¹⁰ Here, the EPC of the loss was determined to be the negligence of the contractor, and coverage applied.¹¹¹

After *Sabella*, the California courts hit a stumbling block with *State Farm Mutual Auto Insurance Co. v. Partridge*.¹¹² *Partridge* presented a very different situation: one involving third-party liability coverage—as opposed to first-party property coverage—where two independent causes acted concurrently to bring about a single loss. The defendant had filed down the trigger on his pistol in order to create a “hair trigger”—one negligent act—and then had injured a passenger in his car as he attempted to shoot jackrabbits from the driver-side window while driving—a second, distinct negligent act.¹¹³ The court held that under third-party liability coverage, where there are concurrent proximate causes of a single loss, coverage applies “whenever an insured risk constitutes simply a concurrent proximate cause of the injuries.”¹¹⁴ In

103. *Id.* at 892.

104. *Id.*

105. *Id.* at 892, 895.

106. *Id.* at 896.

107. *Id.*

108. *Id.* at 896–97.

109. *Id.*

110. *Id.* at 895.

111. *Id.*

112. 514 P.2d 123 (Cal. 1973).

113. *Id.* at 125–27.

114. *Id.* at 130.

other words, the court adopted a concurrent causation approach in place of the EPC doctrine for this scenario. Thus, as long as one of the concurrent causes of the loss was a covered peril, the entire loss would be covered by the policy.

Inevitably, the insured-friendly ruling began to cause confusion. The California appellate courts began to use the *Partridge* concurrent causation analysis instead of *Sabella's* EPC analysis in first-party property cases in order to grant full coverage where one of the concurrent causes of the loss was covered.¹¹⁵ As a result, in 1989, the California Supreme Court took up *Garvey v. State Farm Fire & Casualty Co.* to correct the confusion.¹¹⁶ In *Garvey*, the plaintiffs had moved into a home in the mid-seventies and had purchased an all-risk property policy from State Farm that excluded loss caused "by . . . settling, cracking, shrinkage, bulging or expansion of pavements, patios, foundations, walls, floors, roofs or ceilings . . ."¹¹⁷ A year later, the Garveys discovered damage to the walls from an addition that had begun to pull away from the home.¹¹⁸ As in *Sabella*, the Garveys argued that the loss was covered because it had been caused by negligence on the part of the contractor who built the addition.¹¹⁹ State Farm argued that the loss was caused by earth movement and was therefore excluded.¹²⁰ The trial court, relying on *Partridge*, held that because negligence was a concurrent proximate cause of the loss, the Garveys were entitled to a directed verdict on that issue.¹²¹

Again applying sections 530 and 532, the California Supreme Court reversed, holding that the *Partridge* analysis was inappropriate for first-party property coverage cases and should only be applied in third-party liability coverage cases.¹²² The court pointed out that "because a covered peril usually can be asserted to exist somewhere in the chain of causation in cases involving multiple causes, applying the *Partridge* approach to coverage in first-party cases effectively nullifies policy exclusions in 'all risk' homeowner's property loss policies."¹²³ Instead, *Sabella's* EPC

115. *E.g.*, *Farmers Ins. Exch. v. Adams*, 216 Cal. Rptr. 287, 294 (Ct. App. 1985); *Premier Ins. Co. v. Welch*, 189 Cal. Rptr. 657, 662 (Ct. App. 1983); *see Safeco Ins. Co. of Am. v. Guyton*, 692 F.2d 551, 554-55 (9th Cir. 1982) (applying *Partridge* to find that the insured's loss was covered because third-party negligence was a cause of the loss, despite also finding that the EPC of the loss was flooding, an excluded cause under the policy); *see also Garvey v. State Farm Fire & Cas. Co.*, 770 P.2d 704, 704-05 (Cal. 1989).

116. 770 P.2d at 704-05.

117. *Id.* at 705.

118. *Id.*

119. *Id.* at 706.

120. *Id.*

121. *Id.*

122. *Id.* at 705.

123. *Id.*

analysis is appropriate for first-party property cases.¹²⁴ Furthermore, the EPC is the “predominating” cause, not necessarily the “triggering” cause of the loss.¹²⁵ The *Garvey* court did, however, leave open the possibility of a *Partridge*-like concurrent causation analysis that might apply to first-party property losses in the event that two truly independent causes simultaneously produce an indivisible loss, such as in the earthquake and airplane crash example; in such a case, a *Sabella* analysis may not be helpful as it may be impossible to tell which was the EPC.¹²⁶ But the *Garvey* facts presented a “classic *Sabella* situation,” and the question whether negligence or earth movement was the EPC was a matter for a jury to decide.¹²⁷

I. *The Current State of Garvey and Anti-Concurrent Clauses*

From the foregoing, it appears that California courts have developed bright-line rules applicable to the causation question. If the case involves third-party liability coverage, concurrent causation analysis applies. If it involves first-party property coverage, EPC analysis generally applies. But these rules fostered concern within the insurance industry. Cases such as *Sabella*, *Safeco Insurance Co. v. Motte*,¹²⁸ *Safeco Insurance Co. of America v. Guyton*,¹²⁹ and *Premier Insurance Co. v. Welch*,¹³⁰ among others, represented a trend toward allowing coverage based on negligence for losses that seemed excluded by the contractual terms of the policy.¹³¹ It is easy to imagine a scenario in which any loss might be attributed to some negligence or human error. Thus, these cases created what was considered to be a new and unanticipated cause of loss, making it much more difficult for insurers to control the scope of coverage through contractual terms alone.¹³²

As a result, the industry launched a two-pronged attack on the courts’ expansive reading of the EPC doctrine. They lobbied the California legislature for relief, particularly in the area of earthquake insurance,¹³³ and attempted to add restrictive ACC language to their

¹²⁴ *Id.*

¹²⁵ *Id.* at 708.

¹²⁶ *Id.* at 713 n.9.

¹²⁷ *Id.* at 714–15.

¹²⁸ No. 0298082-9 (Fresno County Cal. Super. Ct. July 1984).

¹²⁹ 692 F.2d 551, 554–55 (9th Cir. 1982) (finding that coverage applied on a negligence theory, and that the lower court had misapplied the causation analysis in a case where insureds’ property had been damaged by rain, an excluded cause).

¹³⁰ 189 Cal. Rptr. 657, 662 (Ct. App. 1983) (applying *Partridge* to find coverage based on negligence where the insureds’ home had been damaged by rain, an excluded cause).

¹³¹ Bragg, *supra* note 14, at 389–91, 393.

¹³² *Id.* at 391, 393.

¹³³ See *infra* text accompanying notes 196–99.

policies.¹³⁴ These alterations limited recovery by squeezing negligence-related causes out of the picture and creating exclusions—particularly for different types of catastrophic loss—to deny coverage where the loss would not have occurred but for the excluded peril.¹³⁵ However, the ultimate success or failure of these measures is still up for debate in California.

Although the California Supreme Court has never expressly ruled on the issue,¹³⁶ many commentators have simply taken for granted that ACC clauses are unenforceable in California, since the courts' interpretation of Insurance Code sections 530 and 532 suggests that the EPC doctrine is not susceptible to alteration by contractual terms.¹³⁷ Ultimately, this conclusion may stem from the fact that historically, California decisions and policy choices have often been pro-insured.¹³⁸ Before we examine why ACC clauses may actually be permitted under certain circumstances, we must first look at the cases undermining their enforceability.

First, prior to the decision in *Garvey*, the Fresno County Superior Court refused to enforce ACC language in *Safeco Insurance Co. v. Motte*, a coverage case involving earthquake damage.¹³⁹ The court held that the ACC language was invalid because the policyholders were not sufficiently informed, and that although "earthquake" was a specifically excluded cause of loss, tectonic plate slippage (the actual cause of the earthquake event) was not expressly excluded.¹⁴⁰ In any event, the court found, negligent design was a concurrent cause of the loss and thus, coverage applied.¹⁴¹ Safeco decided not to pursue the issue at the time, but the industry pushed back, attempting to strengthen the ACC clauses in their policies.¹⁴²

134. Bragg, *supra* note 14, at 393–94.

135. *Id.*

136. Scott G. Johnson, *The Efficient Proximate Cause Doctrine in California: Ten Years After Garvey*, J. INS. COVERAGE, Autumn 1999, at 1, 13.

137. See, e.g., Lavitt, *supra* note 14, at 17; Phillips & Coplen, *supra* note 8, at 35 tbl. 1; Passa, *supra* note 8, at 572; Johnson, *supra* note 136, at 13.

138. Some suggest that one of the goals of California's method of "causation analysis may be its demonstrated passion to find ways to compensate injured parties even at the expense of breaking down common law distinctions between tort and contract." Bragg, *supra* note 14, at 388. Examples of more insured-friendly policies include California's application of the doctrine of *contra proferentem*, the rule that ambiguities in a contract are to be interpreted against the drafter, as well as the doctrine of reasonable expectations. See, e.g., *AIU Ins. Co. v. Superior Court*, 799 P.2d 1253, 1264 (Cal. 1990).

139. Rossmiller, *supra* note 1, at 60 (citing No. 0298082-9 (Fresno County Cal. Super. Ct. July 1984)).

140. *Id.*

141. *Id.*

142. Bragg, *supra* note 14, at 390–91.

In *Safeco Insurance Co. v. Guyton*, Safeco litigated a flood insurance coverage issue.¹⁴³ The water district had not taken sufficient measures to stop flooding from heavy rains. The policy read: “This policy does not insure against loss: . . . I. caused by, resulting from, contributed to or aggravated by any of the following: a. flood, surface water, waves”¹⁴⁴ Nevertheless, the Ninth Circuit, relying on *Partridge*, held that this exclusion was insufficient to bar coverage if negligence was also a proximate cause of the loss.¹⁴⁵

These two cases were decided prior to *Garvey*. Although they demonstrate disfavor for insurers’ attempts to draft policies around concurrent causation, *Garvey* changed the game by barring the concurrent causation analysis from first-party property insurance coverage cases, while leaving open the question of whether ACC clauses would be enforceable in the future.¹⁴⁶ Thereafter, in *Howell v. State Farm Fire & Casualty Co.*, decided post-*Garvey* in 1990, an appellate court suggested that the California courts would refuse to enforce them.¹⁴⁷

In *Howell*, the plaintiff owned a home, three rental units, and a dog kennel, all of which were insured by State Farm under various policies.¹⁴⁸ Unfortunately, Howell’s property was located on a slope susceptible to landslides, and a fire had destroyed much of the protective vegetation nearby, making the slope more vulnerable.¹⁴⁹ The following winter, the slope failed during heavy rainfall, and a major landslide occurred, destroying much of her property.¹⁵⁰ State Farm denied coverage, claiming that the loss was not the result of landslide but of earth movement and water damage, neither of which were covered.¹⁵¹

The exclusions sections of Howell’s policies included the following ACC language:

We do not insure under any coverage for loss (including collapse of an insured building or part of a building) which would not have occurred in the absence of one or more of the following excluded events. We do not insure for such loss regardless of: a) the cause of the excluded event; or b) other causes of the loss; or c) whether other causes acted concurrently or in any sequence with the excluded event to produce the loss¹⁵²

¹⁴³. 692 F.2d 551, 552 (9th Cir. 1982).

¹⁴⁴. *Id.* at 552–53 (emphasis omitted).

¹⁴⁵. *Id.* at 554–55.

¹⁴⁶. See *supra* text accompanying notes 115–27.

¹⁴⁷. 267 Cal. Rptr. 708, 715–16 (Ct. App. 1990).

¹⁴⁸. *Id.* at 709.

¹⁴⁹. *Id.*

¹⁵⁰. *Id.*

¹⁵¹. *Id.* at 709–10.

¹⁵². *Id.* at 710.

Earth movement and water damage were among the excluded perils.¹⁵³ Citing sections 530 and 532, *Sabella*, and *Garvey*, the court held the ACC clause unenforceable, stating that an “insurer may not limit its liability in this manner, since the statutory and judicial law of this state make the insurer liable whenever a covered peril is the ‘efficient proximate cause’ of the loss, regardless of other contributing causes.”¹⁵⁴ The court explained that “if we were to give full effect to the . . . policy language excluding coverage whenever an excluded peril is a contributing or aggravating factor in the loss, we would be giving insurance companies carte blanche to deny coverage in nearly all cases.”¹⁵⁵

From this, it may appear that California has a tight grip on the EPC doctrine, and that ACC clause alteration of the doctrine is impermissible. Without a definitive California Supreme Court ruling, we cannot be certain. But even if we assume that California is one of the few states refusing to apply ACC clauses, its hold seems to be slipping. A pair of recent cases, *Julian v. Hartford Underwriters Insurance Co.*¹⁵⁶ and *Freedman v. State Farm Insurance Co.*,¹⁵⁷ reveal a developing slippery slope of exceptions to the EPC rules. In *Julian*, the plaintiffs’ home had been located just under a slope that failed after heavy rainfall, which caused a tree to fall on the house.¹⁵⁸ The Julians’ home had been insured by Hartford under a general homeowner’s all-risk policy.¹⁵⁹ Among the exclusions in the policy were the following clauses:

1. We do not insure against loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss: . . .
 - b. Earth Movement, meaning . . . landslide
 - c. Water Damage
2. We do not insure against loss to property . . . caused by any of the following. However, any ensuing loss to property . . . not excluded or excepted in this policy is covered.
 - a. Weather conditions. However, *this exclusion only applies if weather conditions contribute in any way with a cause or event excluded in paragraph 1. above to produce the loss . . .*¹⁶⁰

Certain “acts, errors or omissions in design or construction” were also excluded under the policy.¹⁶¹ Hartford denied coverage on the theory that no possible EPC could be covered under the circumstances, as the policy

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 711–12.

¹⁵⁵ *Id.* at 715 n.6.

¹⁵⁶ 110 P.3d 903 (Cal. 2005).

¹⁵⁷ 93 Cal. Rptr. 3d 296 (Ct. App. 2009).

¹⁵⁸ *Julian*, 110 P.3d at 905.

¹⁵⁹ *Id.* at 905 n.2.

¹⁶⁰ *Id.* at 905 (emphasis added).

¹⁶¹ *Id.*

excluded earth movement, third-party negligence, and “weather conditions” if they “contribute in any way with” another excluded peril, in this case, landslide.¹⁶² The Julians argued, on the contrary, that the EPC was either negligence, weather conditions alone, or collapse unrelated to flood, none of which were effectively excluded.¹⁶³ Tellingly, the California Supreme Court framed the issue as whether section 530 and the EPC doctrine “inflexibly” prohibit insurers from excluding some weather conditions and not others.¹⁶⁴

While giving credence to *Garvey*, *Howell*, and the notion that insurers should not be permitted to employ sweeping policy terms to contract around the EPC doctrine or to render the insured’s coverage “virtually illusory,”¹⁶⁵ the court nevertheless found the “weather conditions” clause to be an enforceable exclusion, because perils may be defined “in terms of a relationship between two otherwise distinct perils.”¹⁶⁶ This reasoning effectively creates an escape clause to the EPC doctrine. Since the doctrine is only implicated when multiple perils cause a single loss,¹⁶⁷ permitting insurers to manufacture a single peril out of the relationship between two distinct perils allows them to circumvent the doctrine.

The court likened the exclusion to a policy that covers weather conditions generally but excludes specific weather conditions such as rain, hail, or wind, and justified enforcing the exclusion by virtue of the insured’s reasonable expectations.¹⁶⁸ Relying heavily on the insurer’s engineering report stating that landslides of the type involved are “always” caused by water, the court explained that a reasonable insured would understand the term “contribute in any way with” in this particular policy to exclude rain contributing to landslide.¹⁶⁹ But this rationale is problematic. At the outset, it may very well be that on this particular property, if the policy had named “rain” in combination with other excluded perils, a reasonable insured should have interpreted the clause to exclude landslide caused by rain. But the insurer, instead, chose the overbroad terms “weather conditions” and “contributing in any way with” to effectuate its intent. Whether there is sufficient difference in clarity between these terms and the terms used in *Howell*¹⁷⁰ for a reasonable insured to be expected to anticipate *this* exclusion is

162. *Id.* at 906.

163. *Id.*

164. *Id.* at 910.

165. *Id.* at 908.

166. *Id.* at 911.

167. See 7 RUSS & SEGALLA, *supra* note 9, § 101:55.

168. *Julian*, 110 P.3d at 911–12.

169. *Id.*

170. See *supra* text accompanying notes 152–54.

debatable. More importantly, the court's rationale is troubling, because the exclusion does not seem sufficiently narrow to avoid the "illusory" coverage problems condemned in *Howell*.

As United Policyholders pointed out in an amicus brief, reading the clauses literally meant that if the Julians' loss had been caused ninety-nine percent by a weather condition and one percent by a negligible amount of earth movement or water, then it would not have been covered.¹⁷¹ This is the exact result that *Garvey*, *Howell*, and the EPC doctrine attempt to avoid. Even the *Julian* court recognized this, stating that the use of the phrase "contribute in any way with" to link landslides with weather conditions "seems particularly designed to circumvent the efficient proximate cause doctrine."¹⁷² In its opinion, the court warns that a case resembling United Policyholders's hypothetical would "raise troubling questions regarding the clause's consistency with the efficient proximate cause doctrine. Denial of coverage for such a loss would suggest the provision of illusory insurance against weather conditions."¹⁷³ As a result, the court limited its holding to the specific facts (rain and landslide), again relying heavily on the engineer's report that landslide in these cases is "always" caused by water.¹⁷⁴

Julian seemed to be an isolated event at first. In fact, a few years later, an appellate court decided *De Bruyn v. Superior Court*.¹⁷⁵ There, the court noted that *Julian* was limited to its facts and refused to allow an insurer to claim that under *Julian*, insurers may exclude particular perils "however caused," without reference to the EPC doctrine.¹⁷⁶ The court, however, proceeded to apply *Julian*'s reasoning that an insurer may cover certain forms of a peril and exclude other forms of the same peril.¹⁷⁷ Interestingly, the facts in *De Bruyn* create a case where such reasoning can be more soundly applied than did the facts in *Julian* itself. In *De Bruyn*, the homeowners returned from vacation to discover water and mold damage caused by an overflowed toilet.¹⁷⁸ After review, their insurer agreed to cover the water damage from the overflow, but refused to cover any mold damage.¹⁷⁹ The homeowner's policy generally excluded water damage but expressly included water damage from "sudden and accidental discharge or overflow of water from within a plumbing . . . system."¹⁸⁰ This inclusion was itself expressly limited by a

171. *Julian*, 110 P.3d at 911.

172. *Id.*

173. *Id.*

174. *Id.* at 911-12.

175. 70 Cal. Rptr. 3d 652 (Ct. App. 2008).

176. *Id.* at 658-59.

177. *Id.* at 659.

178. *Id.* at 654.

179. *Id.*

180. *Id.* at 658.

clause stating that mold would not be covered under any circumstances.¹⁸¹

Under these circumstances, basing a decision on the reasonable expectations of the insured—as the *Julian* court did—is relatively unremarkable. The problem with the holding in *Julian* is not that it is unreasonable to allow insurers to cover certain forms of a peril and exclude other forms, but that insurers should not be permitted to combine perils to circumvent the EPC doctrine or to effectuate “illusory” coverage when they do so. In *De Bruyn*, the insurer covered some forms of water damage and not others; there was no “combined” peril. They did not use the mold exclusion to enable them to deny the whole claim, just the portion of the damage caused by mold. Therefore, coverage was not rendered illusory. As such, *De Bruyn* is a good example of how a policy covering only certain forms of a peril might be applied fairly, meeting the reasonable expectations of the insured.

While it seemed that *Julian* had been successfully limited to its facts, the court muddled the waters in 2009 when it decided *Freedman v. State Farm Insurance Co.*¹⁸² In *Freedman*, a contractor remodeling the Freedmans’ bathroom had unknowingly driven a nail through a pipe.¹⁸³ The nail caused no leakage at first, but years later, it corroded and water began to leak slowly, causing extensive water damage.¹⁸⁴ State Farm denied the entire claim.¹⁸⁵ Under the homeowner’s policy, water damage caused by rust was excluded from coverage.¹⁸⁶ Along with this, the following “combined peril” clauses were added:

We do not insure for loss described in [the exclusions paragraphs] regardless of whether one or more of the following: (a) directly or indirectly cause, contribute to or aggravate the loss; or (b) occur before, at the same time, or after the loss or any other cause of the loss:

- a. conduct, act, failure to act, or decision of any person, group, organization or governmental body whether intentional, wrongful, negligent, or without fault;
- b. defect, weakness, inadequacy, fault or unsoundness in: . . .
 - (2) design, specifications, workmanship, construction, grading, compaction¹⁸⁷

While the Freedmans claimed the EPC of their loss was the contractor’s negligence, State Farm contended that the EPC was irrelevant as third-

181. *Id.*

182. 93 Cal. Rptr. 3d 296 (Ct. App. 2009), *rev. denied* (2009).

183. *Id.* at 299.

184. *Id.*

185. *Id.*

186. *Id.* at 298–99.

187. *Id.* at 299.

party negligence was excluded under the policy whenever it combined with other excluded perils (in this case, water damage).¹⁸⁸

The *Freedman* court, relying on *Julian*, upheld the exclusion.¹⁸⁹ Without a single mention of the *Julian* court's warnings regarding the EPC doctrine or the limitation of *Julian* to its facts, the *Freedman* court agreed with State Farm, explaining that third-party negligence was excluded under the policy whenever it combined with water damage.¹⁹⁰ The court also rejected without discussion the Freedmans' argument that the negligence exclusion was not sufficiently clear.¹⁹¹ Here we can see the danger in *Julian*'s holding. Presumably, if the Freedmans' loss had been ninety-nine percent the result of third-party negligence combined with some slight water damage, the Freedmans would be left without coverage. More importantly, unlike the evidence in *Julian* that the type of landslide at issue was "always" caused by water, there was no such evidence in *Freedman* linking negligence and pipe leakage. Thus, the appellate court seems to have expanded *Julian*'s scope and given insurers license to combine any set of perils, thereby eluding the EPC doctrine. This slope is poised to fail.

Julian and its progeny throw the certainty of California's grasp on the EPC doctrine into doubt. While "combined peril" clauses are not classic ACC clauses, this new strategy of creating a single peril out of the relationship between two distinct perils accomplishes a similar goal. The purpose of ACC clauses is to circumvent the EPC doctrine.¹⁹² While the "combined peril" language is less all-encompassing than the typical "but for" ACC clause, broad terms such as "weather conditions" come close to the line and effectively avoid the EPC doctrine. Take *Freedman* for example: Insurers had been concerned about the courts' twenty-five-year trend of allowing coverage for negligence for a loss that seemed to be excluded by the express provisions in their policies.¹⁹³ By fashioning a single excluded peril that arises only when negligence combines with a another distinct excluded peril, insurers achieve two things: first, they are able to circumvent the EPC doctrine on that issue; second, they eschew the loss in premiums that would necessarily result if they were to exclude negligence altogether. In other words, they get to have their cake and eat it too.

Even if we were not as concerned with "combined peril" exclusions as we are with ACC clauses, it seems apparent from the *Julian* line of cases that at the very least, the EPC doctrine is not impermeable in

188. *Id.*

189. *Id.* at 301.

190. *Id.*

191. *Id.*

192. See Rossmiller, *supra* note 1, at 46.

193. Bragg, *supra* note 14, at 389-91, 393.

California. We have no crystal ball to tell us how the courts will apply *Julian* in the future, or to what number and breadth of factual scenarios and combinations of perils these clauses will be applied. Insurers will have to guess how far they can push the envelope. Insureds will be forced to guess which “weather conditions” are most likely to exacerbate other exclusions in their policies and whether negligence is likely to be a factor, all while paying premiums that reflect coverage for these classes of perils generally. Unfortunately, it is exactly this sort of uncertainty that can make application of the EPC doctrine so troublesome.¹⁹⁴

2. *The Earthquake Problem*

Not only have insurers won ground on the judicial front in their efforts to avoid the EPC doctrine, but they have also won significant ground on the legislative front. Despite the addition of ACC clause limitations to homeowner’s policies, insurers still feared that because previous causation decisions—*Sabella* and its kin—were couched in terms of Insurance Code sections 530 and 532, courts might ultimately determine that the EPC analysis was so entrenched that they could not permit insurers to “contract around” it without legislative consent, either implicit or express.¹⁹⁵ Thus, the insurance industry launched the second prong of its attack, lobbying the California legislature for protection, particularly from earthquake-related damage.¹⁹⁶ Several years and rejected bills later, the industry succeeded in having Assembly Bill 2865,¹⁹⁷ enacted in 1984, shortly before *Garvey*.¹⁹⁸ The new sections created an express exemption for earthquake loss from the EPC analysis. Section 10088 states, in part:

Notwithstanding the provisions of Section 530, 532, or any other provision of law, and in the absence of an endorsement or an additional policy provision specifically covering the peril of earthquake, no policy which by its terms does not cover the peril of earthquake shall provide or shall be held to provide coverage for any loss or damage when earthquake is a proximate cause regardless of whether the loss or damage also directly or indirectly results from, or is contributed to, concurrently or in any sequence by any other proximate or remote cause, whether or not covered by the policy.¹⁹⁹

Section 10088.5 adds that section 10088 does not “exempt[] an insurer from its obligation under a fire insurance policy to cover losses of a fire

194. See *supra* notes 46–47, 78 and accompanying text.

195. See Bragg, *supra* note 14, at 398.

196. *Id.*

197. Assemb. B. 2865, 1983–84 Leg., Reg. Sess. (Cal. 1984) (codified at CAL. INS. CODE §§ 10081–10089.4 (West 2005)).

198. Bragg, *supra* note 14, at 398.

199. INS. § 10088.

which is caused by or follows an earthquake.”²⁰⁰ Thus, any cause of loss other than fire, such as negligent construction, explosion, flooding, and the like, will not be covered if they occur in a situation in which an earthquake can be considered one proximate cause of the damage. In effect, section 10088 functions as a sort of legislatively-mandated ACC clause tailored to earthquake loss; unless a separate earthquake policy is in place, an earthquake will be considered the proximate cause and the loss will not be covered, regardless of any other covered, concurrent causes.²⁰¹ Note that this also applies to loss for which aftershocks are a proximate cause.²⁰²

But with this exemption, the insurance industry took the bitter as well as the sweet. In exchange for the causation concession, insurers became required to offer earthquake coverage along with any residential property insurance coverage.²⁰³ The insurer can make the coverage offer directly or arrange for it to be made by a third-party insurer, but the statute requires a particular written format and an explanation to policyholders that they will not be covered for any earthquake damage under their policy without purchasing separate earthquake coverage.²⁰⁴ The intent behind these provisions was certainly to protect insurance companies from insolvency following a major earthquake event—but it was also to encourage California homeowners to purchase adequate earthquake coverage and to ensure such coverage would be available.²⁰⁵ This bill seemed the perfect solution to the earthquake insurance problem until the Northridge earthquake hit in 1994 and caused over \$12 billion in insurance losses.²⁰⁶ Scientists had been unaware that a fault line existed in the area until the earthquake hit, illustrating another difficulty in anticipating earthquakes and implementing coverage, even in California where earthquakes are widely understood to be a threat.²⁰⁷ Similar to the

200. *Id.* § 10088.5.

201. See *Consumers: Earthquake Insurance*, CAL. DEP'T OF INS., <http://www.insurance.ca.gov/0100-consumers/0060-information-guides/0040-residential/earthquake-insurance.cfm> (last visited Feb. 2, 2011) (explaining that under section 10088, earthquake will be considered the proximate cause of a loss regardless of any other causes that might be covered under the homeowner's property insurance).

202. *Id.*

203. INS. § 10081 (requiring insurers issuing new or renewed residential property insurance policies to offer earthquake coverage also, either provided in the residential property policy itself or in a separate policy); see also Bragg, *supra* note 14, at 398. The minimum amount is set forth in section 10089. INS. § 10089.

204. See generally INS. §§ 10081–10089.4 (laying out the various formal requirements for offers of earthquake insurance).

205. See e.g., *Jacobellis v. State Farm Fire & Cas. Co.*, 120 F.3d 171, 173–74 (9th Cir. 1997); *Marina Green Homeowners Ass'n v. State Farm Fire & Cas. Co.*, 30 Cal. Rptr. 2d 364, 367 (Ct. App. 1994); *Williams v. State Farm Fire & Cas. Co.*, 265 Cal. Rptr. 644, 646–47 (Ct. App. 1990); Bragg, *supra* note 14, at 398.

206. See *Hearings*, *supra* note 2, at 62; RAWLE O. KING, CONG. RESEARCH SERV., RL 32847, TSUNAMIS AND EARTHQUAKES: IS FEDERAL DISASTER INSURANCE IN OUR FUTURE? 14 (2005).

207. ERICSON & DOYLE, *supra* note 29, at 187.

response following Hurricanes Andrew and Katrina, after the 1994 Northridge earthquake, the insurance industry fled the scene, greatly restricted homeowner's insurance policy sales in California, and in some cases, refused to sell any new homeowner's policies.²⁰⁸ Some insurers went so far as to engage in fraud in order to avoid coverage.²⁰⁹ Much like Florida had done in the wake of Hurricane Andrew, California established the California Earthquake Authority ("CEA") to combat the problem.²¹⁰ While the response was similar, the CEA's structure is significantly different from that of the FHCF.

The CEA is a publicly-managed but largely privately-funded organization designed to oversee and administer earthquake "mini" or add-on policies, which participating insurance companies may offer in order to satisfy the requirement imposed by section 10081.²¹¹ For a service charge, participating insurers offer the mini-policies, manage the details, and accept all premiums from the insureds on behalf of the CEA.²¹² Of course, insureds are not required to accept the offer of earthquake coverage, but when they do, the mini-policies provide skeletal coverage protecting only their dwellings, not outside structures such as swimming pools and patios, from earthquake shake loss.²¹³ Presumably, damage caused by any ensuing fire, explosion, or water damage (non-shake loss) would then be covered under standard homeowner's insurance policies.²¹⁴ The CEA is currently reported to be in good financial health with a claims-paying capacity of approximately \$9.8 billion.²¹⁵

But financial health is, unfortunately, not always an accurate measure of success. While the CEA is sound enough to withstand a 250-year earthquake event, to date, only twelve-to-thirteen percent of California homeowners have actually purchased earthquake insurance.²¹⁶ The scientific community agrees that a 6.7 magnitude earthquake is

208. *Hearings*, *supra* note 2, at 62; KING, *supra* note 206, at 14.

209. *See, e.g.*, *State Farm Fire & Cas. Co. v. Superior Court*, 62 Cal. Rptr. 2d 834, 841-42 (Ct. App. 1997) (detailing plaintiff's evidence that following the Northridge earthquake, State Farm representatives forged the insured's signature on documents, destroyed evidence, manufactured evidence, and employed evasive litigation strategies in order to conceal information related to whether State Farm had fulfilled section 10088's requirements).

210. *Hearings*, *supra* note 2, at 62; KING, *supra* note 206, at 14.

211. *See Hearings*, *supra* note 2, at 63-64.

212. *Id.* at 63.

213. CLAIRE WILKINSON, INS. INFO. INST., THE CALIFORNIA EARTHQUAKE AUTHORITY 3-4 (2008).

214. KING, *supra* note 206, at 14.

215. *Hearings*, *supra* note 2, at 64; *see California Earthquake Authority—Version 2.0 Financial Rating*, CAL. EARTHQUAKE AUTH., <http://www.earthquakeauthority.com/index.aspx?id=36&pid=1> (last visited Feb. 2, 2011).

216. *Hearings*, *supra* note 2, at 65; Bowers, *supra* note 2, at 23.

guaranteed to occur somewhere in California in the next thirty years.²¹⁷ Illustrating the danger, a 7.2 magnitude earthquake, the worst the area has seen since 1892, struck Baja California, Mexico on April 4, 2010,²¹⁸ causing what experts estimate should not exceed \$1 billion total in damage, with \$300 million in insured losses.²¹⁹ Fortunately for California, it was not at the epicenter of the quake, and most of the momentum progressed northwest.²²⁰ But the state will not always be so lucky. In fact, most Californians live within twenty miles of a fault line.²²¹ This means that in the wake of a major earthquake event, California homeowners may suffer unprecedented (and uncovered) loss, despite the CEA's existence. Prior to the Baja California event, Glenn Pomeroy, the Chief Executive Officer of the CEA, gave the following example to demonstrate the problem: Following a 7.2 magnitude earthquake striking the peninsular region on the San Andreas Fault, which leads up through San Francisco, homeowners could suffer over \$55.1 billion in losses, but at the current rate, only \$4.1 billion would actually be covered.²²² This is despite the fact that the CEA has the capacity to pay up to \$9.8 billion.²²³

Why are so many California homeowners uninsured despite the likelihood of a quake, the availability of CEA policies, and the requirement that they be offered (and reoffered) earthquake insurance? Simply put, coverage is still too expensive.²²⁴ Particularly in high-risk areas, earthquake insurance policies can cost more, alone, than the rate of basic homeowner's and fire insurance.²²⁵ On top of that, most policies require a fifteen percent deductible, meaning that a home would need to suffer a great deal of loss before the insured sees a dime from the insurance company.²²⁶ For many the benefits simply do not outweigh the costs.²²⁷

Why are the CEA policies so expensive? Mr. Pomeroy explains that the high cost results from the fact that the CEA's own "reinsurance costs are simply massive."²²⁸ The CEA depends upon reinsurance for much of its claim-paying capacity.²²⁹ At this point, approximately forty percent of

217. *Hearings*, *supra* note 2, at 64.

218. *Magnitude 7.2—Baja California, Mexico*, USGS (Apr. 4, 2010), <http://earthquake.usgs.gov/earthquakes/recenteqsww/Quakes/ci14607652.php#summary>.

219. *Experts Estimate \$300 Million in Losses from Mexico Earthquake*, *INS. J.* (Apr. 6, 2010), <http://www.insurancejournal.com/news/west/2010/04/06/108788.htm>.

220. USGS, *supra* note 218.

221. *Hearings*, *supra* note 2, at 64.

222. *Id.* at 65.

223. *Id.* at 64.

224. *Id.* at 65; KING, *supra* note 206, at 14.

225. *Hearings*, *supra* note 2, at 65.

226. *Id.*; see Bowers, *supra* note 2, at 23.

227. *Hearings*, *supra* note 2, at 65.

228. *Id.* at 66.

229. *Id.*

the CEA's premium revenue goes to paying the high cost of reinsurance in the global market, and reinsurers have paid back only \$250,000 in claims over the past thirteen years.²³⁰ Essentially, the CEA is forced to spend forty percent of its premium revenue each year for reinsurance coverage for a mega-catastrophe (defined as a 545-year earthquake event) that is highly unlikely to occur.²³¹ Worse still, in 2010, the price of the CEA's reinsurance contracts rose further by fifteen percent and will only continue to rise.²³² As premiums go up, it is safe to assume that the number of homeowners who chose to purchase insurance will only drop.

3. *California's Approach to Causation and Catastrophe Insurance Is on Shaky Ground*

California's approach, combining the bright-line *Garvey* rules for EPC analysis with the earthquake exception and the CEA, presents an example of one workable framework that other states, such as those in the Gulf Coast, might follow to resolve the uncertainty of causation analysis and catastrophe coverage. Theoretically, a codified EPC analysis should remove much uncertainty as to when it will be applied or whether it may be contracted around. The earthquake exception and the CEA then relieve the insurance industry of one of the EPC doctrine's failings: the possibility that the industry might be hit with unanticipated claims after a major catastrophe.

But, of course, that is only in theory. Based on the foregoing, the solution is far from trustworthy as it stands. Cases such as *Julian* and *Freedman* demonstrate that insurers have been able to effectively contract around the EPC doctrine, despite *Garvey*. Moreover, the current earthquake insurance regime is insufficient to protect against a major earthquake event. Barely twelve-to-thirteen percent of Californians have actually purchased earthquake coverage for their homes.²³³ At this rate, California homeowners could end up in the same position as Katrina victims: with unprecedented loss and only the hope of an ad hoc federal bailout to rescue them following a major earthquake event. In short, California—and other states wishing to follow California's example—needs to plug up the leaks.

Part II of this Note has examined the state of the EPC doctrine and the role of ACC language in post-Katrina litigation. It has also revealed the uncertainty plaguing the California model, both with regards to the EPC doctrine, as well as to gaps in earthquake coverage. Part III of this Note will suggest a two-tiered solution, recommending that the

230. *Id.* at 67.

231. *Id.* at 67–68.

232. *Id.* at 68–69.

233. *Id.* at 65; Bowers, *supra* note 2, at 23.

California courts limit *Julian's* effect on the judicial level, and that Congress enact the Homeowners' Defense Act on the legislative level.

III. THE CALIFORNIA APPROACH REVISITED: A TWO-TIERED SOLUTION

As we have seen, the causation problem is intricate: First, the EPC doctrine has been applied haphazardly, leading to uncertainty for insured and insurer alike. Second, refusing to give force to insurers' attempts to "contract around" the doctrine can lead to justifiable concerns on the part of insurers regarding catastrophic loss. Third, catastrophic events tend to lead to a mass exodus of insurers, leaving little homeowner's insurance to be found. A brief side-by-side comparison of California and Florida, two states that have implemented state-managed disaster relief programs, will demonstrate the mechanisms states have employed to combat these problems.

In California, the EPC doctrine is codified, and until recently, the courts seemed disinclined to allow insurers to contract around it. In order to quell the insurance industry's fears regarding earthquake coverage, the California legislature statutorily barred earthquake damage from the EPC analysis. Following the 1994 Northridge earthquake, California created the CEA to increase the availability of earthquake insurance and to entice insurers to return. Unfortunately, since only twelve-to-thirteen percent of California homeowners are currently covered, the CEA's financial health is essentially moot.

Compare this to the Floridian response: The Florida courts have substituted a concurrent causation analysis in place of the EPC doctrine.²³⁴ Following Hurricane Andrew, Florida created the FHCF in order to induce insurers to return to the Florida market.²³⁵ Unlike the CEA, which requires insureds to purchase a separate "mini-policy" to cover earthquake loss, the FHCF incorporates its wind/water protection into the body of standard homeowner's policies.²³⁶ Unfortunately, however, the FHCF is seriously financially overextended.²³⁷

The benefit of the Floridian concurrent causation model is that results are much easier to anticipate in the average case.²³⁸ Where there are two "but for" causes, one of which is not covered and one of which is covered, coverage applies.²³⁹ However, under *Garvey's* application of Insurance Code sections 530 and 532, it is unlikely that the California courts will adopt the Floridian model unless the legislature amends those sections. More importantly, applying a concurrent causation analysis to

234. Phillips & Coplen, *supra* note 8, at 35.

235. Bowers, *supra* note 2, at 22.

236. *Id.* at 22-23.

237. See *supra* notes 94-95 and accompanying text.

238. Knutsen, *supra* note 78, at 983.

239. Phillips & Coplen, *supra* note 8, at 33-34.

first-party property coverage seems to tip the scale too far to the insureds' side, as it may essentially nullify all the exclusions in a policy.²⁴⁰ On the catastrophic-loss front, the FHCF and the CEA seem to be equally flawed, equally unsound. So how should California prepare itself for the inevitable "big one"? The following proposal incorporates both a judicial as well as legislative response.

A. A JUDICIAL RESPONSE

First, at the judicial level, the California courts need to seal the gap left by *Julian*. As commentators have noted, inconsistency in the application of causation analyses in insurance cases imposes significant costs on the court, insurer, and insured.²⁴¹ In fact, the California courts have been accused of fluctuating between three different doctrinal approaches to causation within the last thirty years.²⁴² But the doctrinal shifts inherent in the *Sabella*, *Partridge*, and *Garvey* cases can be attributed to a need to differentiate between two distinct types of insurance: first-party property and third-party liability insurance. Additionally, the shift inherent in the court's decision in *Julian* seems to have been unintentional; indeed, the court held *Julian* to be limited to its facts.²⁴³ Accordingly, while the logic in *Julian* that an insurer should be able to cover certain forms of a peril and not other forms is capable of being properly applied, as evidenced in *De Bruyn*,²⁴⁴ the California courts should reestablish that *Julian* is not to be employed to create another costly shift in policy. Insurers should not be permitted to paralyze the EPC doctrine by turning two distinct perils into a single peril, or to effect "illusory" coverage.

Commentators have argued that the EPC approach creates uncertainty above and beyond doctrinal fluctuations, insofar as the outcomes of individual cases are unpredictable.²⁴⁵ And courts have only complicated the issue by inconsistently applying ACC clauses.²⁴⁶ As a result, some commentators have thrown up their hands, arguing for a

240. See *Garvey v. State Farm Fire & Cas. Co.*, 770 P.2d 704, 705 (Cal. 1989); Knutsen, *supra* note 78, at 984.

241. See *supra* note 78 and accompanying text.

242. Knutsen, *supra* note 78, at 979 & n.67 (noting that within a thirty-year period, the California courts adopted a concurrent causation analysis in *Partridge*, then an EPC approach for first-party property coverage in *Garvey*, and most recently, narrowed the approach by allowing "combined peril" exclusions as an exception to the doctrine in *Julian*).

243. *Julian v. Hartford Underwriters Ins. Co.*, 110 P.3d 903, 911–12 (Cal. 2005).

244. See *supra* notes 175–81 and accompanying text.

245. See Knutsen, *supra* note 78, at 981 (explaining that the EPC doctrine's all-or-nothing approach leads to consistency problems in that it can require an impossible "metaphysical debate" in some cases and unusually high litigation costs in others).

246. *Id.*

complete abandonment of the EPC doctrine.²⁴⁷ But there is a much less drastic solution. It would be naïve to hope there will ever be a causation analysis that solves all outcome inconsistency problems. But we may attempt to avoid those inconsistencies that are the most troublesome.

Inconsistency becomes particularly problematic when dealing with mega-catastrophes like earthquakes and hurricanes.²⁴⁸ California's approach can function as a practical solution that is both workable and fair. By codifying the EPC doctrine and refusing to allow insurers to contract around it, much inconsistency can be eliminated. Statutorily exempting catastrophic loss such as earthquakes from this rule both reassures insurers and simultaneously encourages insureds to take steps to protect themselves. But the benefits of the California system are lost if insurers are permitted to take incremental swipes at the EPC doctrine. The courts, therefore, should minimize the costly effects of inconsistency by restricting *Julian*'s reach and reasserting the primacy of the doctrine.

B. A LEGISLATIVE RESPONSE

In order for the California approach to be most effective, a legislative response is also necessary to prepare the state for an impending natural catastrophe. Unfortunately, history has shown that the private insurance market will not, or cannot, insure against the significant catastrophic risk that many states face²⁴⁹—at least not at a cost homeowners can afford.²⁵⁰ Too few homeowners are willing to purchase earthquake insurance, instead choosing to rely on luck and ad hoc federal disaster relief efforts.²⁵¹ Legislators have frequently called for the creation of a federal disaster insurance program to off-set the shortcomings of the private market, but Congress has generally declined.²⁵²

The National Flood Insurance Program (“NFIP”) is one outlier. NFIP is a federal disaster insurance program created to provide flood insurance in exchange for an agreement by participating communities to

247. See, e.g., *id.* (arguing for the application of “apportionment” and “liberal” approaches to causation, following a more rigorous categorization of the involvement of each cause in a loss); Lavitt, *supra* note 14, at 47–63 (arguing for the repurposing of tort law principles, as announced in the Restatement (Third) of Torts, to apply to four paradigmatic insurance causation scenarios).

248. See Knutsen, *supra* note 78, at 991–92, 1022.

249. See, e.g., *Hearings*, *supra* note 2, at 10; KING, *supra* note 206, at 12; ORSZAG & FONTAINE, *supra* note 86, at 10. See generally ERICSON & DOYLE, *supra* note 29, at 184–211 (providing an in-depth discussion of this problem, and tracing the uncertainty of earthquakes and the insurance industry's failure, to date, to provide adequate coverage, even to the point that some insurers provide far more coverage than they can actually support in the event of a large earthquake).

250. *Hearings*, *supra* note 2, at 12; KING, *supra* note 206, at 12.

251. KING, *supra* note 206, at 13.

252. *Id.* at 22 (citing a failure to agree on what sort of national catastrophe insurance program would work, a fear of unnecessary government intrusion into the private sector, and the concern that the “true” cost of such a program could be quite high).

adopt floodplain management measures.²⁵³ But coverage under NFIP has created much confusion due to an apparent overlap with private insurance coverage, as well as with other state programs such as Florida's Citizens Property Insurance Corporation ("CPIC").²⁵⁴ Some have claimed that this confusion even facilitated independent claims adjusters foisting off onto the federal government Katrina-related damage that ought to have been covered by private insurers.²⁵⁵ NFIP detractors claim that the program owes billions of dollars to the U.S. Treasury and fails to charge premiums that will cover its costs.²⁵⁶ NFIP's performance, it is argued, demonstrates the inevitable failure of any further attempts by the federal government to enter into the disaster insurance arena.²⁵⁷ Other arguments leveled against a federal disaster insurance plan evince concerns that such a program may cost tax payers billions and encourage coastal development that could harm the environment.²⁵⁸

While these arguments are well taken, history has shown that the federal government is already effectively the insurer of last resort following a natural catastrophe.²⁵⁹ Whether Congress sweeps in with an ad hoc federal bailout, as it did following Katrina, or whether it establishes a proactive, measured approach, people look to the Congress to help rebuild their lives when disaster strikes.²⁶⁰ Indeed, most insurance market analysts agree that there is not a single state in the union without exposure to natural catastrophes.²⁶¹ Federal bailouts, of course, also come from taxpayer pockets and create a false sense of security on the part of homeowners, who become apathetic towards taking loss-prevention steps.²⁶² There is simply a more economical approach: Congress can work directly with the private industry and existing state relief programs in

253. FEMA, NATIONAL FLOOD INSURANCE PROGRAM: PROGRAM DESCRIPTION I (2002).

254. KING, *supra* note 87, at 1–2; Lavitt, *supra* note 14, at 46.

255. Stephanie Grace, *Flood Program Free-For-All: Did Insurance Companies Take a Blank Check?*, TIMES-PICAYUNE, June 17, 2007, at B7.

256. See, e.g., David C. John & Matt Mayer, *Homeowners' Defense Act Rewards States for Bad Property Insurance Decisions*, THE HERITAGE FOUND. (July 29, 2009), <http://www.heritage.org/Research/Reports/2009/07/Homeowners-Defense-Act-Rewards-States-for-Bad-Property-Insurance-Decisions>; Eli Lehrer, *Ensuring Disaster*, AM. SPECTATOR (May 2, 2008, 12:07 AM), <http://spectator.org/archives/2008/05/02/ensuring-disaster>.

257. John & Mayer, *supra* note 256; Lehrer, *supra* note 256.

258. See, e.g., JUSTIN R. PIDOT, GEO. ENVT'L. L. & POL'Y INST., COASTAL DISASTER INSURANCE IN THE ERA OF GLOBAL WARMING I (2007); John & Mayer, *supra* note 256; Arthur D. Postal, *Environmental Groups Oppose Homeowners Defense Act*, NAT'L UNDERWRITER (June 1, 2010, 10:20 AM), <http://www.property-casualty.com/News/2010/6/Pages/Environmental-Groups-Oppose-Homeowners-Defense-Act.aspx>.

259. ORSZAG & FONTAINE, *supra* note 86, at 17–18.

260. *Id.* at 1.

261. RAWLE O. KING, CONG. RESEARCH SERV., RL 33086, HURRICANE KATRINA: INSURANCE LOSSES AND NATIONAL CAPACITIES FOR FINANCING DISASTER RISK 7 (2005).

262. ORSZAG & FONTAINE, *supra* note 86, at 17–18.

order to protect Americans from natural catastrophes by reintroducing and enacting the Homeowners' Defense Act of 2009.²⁶³

The HDA was initially introduced in Congress in 2007 and then reintroduced by Representative Ron Klein in 2009.²⁶⁴ Although it passed the House Financial Services Committee in 2010,²⁶⁵ it has not yet been reintroduced in the new session.²⁶⁶ The HDA is a federal catastrophe insurance proposal establishing "an integrated public-private partnership" that would not only create more disaster coverage at a lower price, but also would incentivize the adoption of catastrophe loss-mitigation strategies.²⁶⁷ Additionally, the differentiation in premiums that will result from the plan may encourage homeowners to remain in or perhaps even relocate to less disaster-prone areas, thereby alleviating some concerns over environmental effects.²⁶⁸

Title I of the HDA would establish a voluntary National Catastrophe Risk Consortium among participating states.²⁶⁹ Under this plan, homeowners would purchase coverage from private or state residual insurers, who would then assign some or all of the catastrophe risk to state reinsurance programs approved by the Consortium.²⁷⁰ The state reinsurance programs would work with the Consortium to transfer the risk via insurance-linked securities or coordinated reinsurance contracts.²⁷¹ Title II of the HDA would set forth a three-year federal commitment to guarantee or "backstop" debt issued by approved state insurance and reinsurance programs that are either involved in residential property insurance coverage or designed to enhance the private market for such coverage.²⁷² In order to participate, states must agree to adopt loss-mitigation programs and zoning and land use plans to help mitigate losses caused by natural disasters.²⁷³ They must further: (1) maintain expressly qualified state programs; (2) prove that their

263. H.R. 2555, 111th Cong. (2009).

264. *Rooney Supports Measure to Lower Property Insurance Costs*, CONGRESSMAN TOM ROONEY, http://rooney.house.gov/index.php?option=com_content&task=view&id=3059&Itemid=300045 (last visited Feb. 2, 2011); *H.R. 3355 [110th]: Homeowners' Defense Act of 2007*, GOVTRACK.US, <http://www.govtrack.us/congress/bill.xpd?bill=h110-3355> (last visited Feb. 2, 2011).

265. *H.R. 2555: Homeowners' Defense Act of 2010*, OPENCONGRESS, <http://www.opencongress.org/bill/111-h2555/actions> (last visited Feb. 2, 2011); see also *Financial Services Committee Approves Homeowners Defense Act*, CCH FIN. REFORM NEWS CTR. (Apr. 28, 2010, 3:57 PM), <http://financialreform.wolterskluwerlb.com/2010/04/financial-services-committee-approves-homeowners-defense-act.html>.

266. See *Homeowners' Defense Act of 2010*, *supra* note 4.

267. ORSZAG & FONTAINE, *supra* note 86, at 2, 18–19.

268. *Id.* at 22.

269. RAWLE O. KING, CONG. RESEARCH SERV., RL 40680, FINANCING CATASTROPHIC RISK: SUMMARY OF THE HOMEOWNERS' DEFENSE ACT OF 2009 (S. 505 AND H.R. 2555) 2–3 (2009).

270. *Id.*

271. *Id.* at 3.

272. *Id.*

273. ORSZAG & FONTAINE, *supra* note 86, at 2.

program's designs and rates are actuarially sound; and (3) limit state-issued debt to eighty percent of their qualifying assets, among other requirements.²⁷⁴ The U.S. Treasury would charge a fee for each guarantee of no more than 0.5%, and any debt incurred by the state programs must be repaid within thirty years.²⁷⁵ Title III would establish a Federal Natural Catastrophe Reinsurance Fund allowing the state programs to purchase one-year "excess-of-loss" reinsurance policies from the U.S. Treasury to cover 200-year (and beyond) events, to a maximum aggregate federal liability of \$200 billion per year.²⁷⁶ Finally, Title IV of the HDA would require Mitigation Grant Programs to help prevent or mitigate loss caused by natural disasters.²⁷⁷

From the foregoing, it is easy to see how the HDA would directly affect the availability and prevalence of earthquake insurance in California. Under Title II, state programs such as the CEA would be able to reduce their current dependence on costly annual reinsurance. As a result, earthquake coverage premiums would decrease by an estimated thirty-five percent, deductibles would be cut in half, and consumers would be provided with more choices.²⁷⁸ By the CEA's own estimation, this would double the number of Californians able to purchase earthquake insurance and encourage further prophylactic measures to protect property from catastrophic loss.²⁷⁹ This strategy will enhance the CEA's impact and will enable California to maximize the utility of its plan in preparation for the "big one." Other disaster-prone states need not recreate the wheel. They may follow California's example, designing state plans similar to the CEA in order to benefit from the HDA. Because the plan is voluntary, states could choose to opt in or out of the program as they see fit. Those states fortunate enough to be less vulnerable to major natural disasters may choose to implement alternative methods of coverage for their minimal risk, and taxpayers in those states will no longer bear responsibility for, at least some, federal disaster relief expenses.²⁸⁰

Opponents to the HDA criticize that, if enacted, it will cost the federal government \$1.7 billion over the first five years.²⁸¹ A Congressional

274. KING, *supra* note 269, at 3–4.

275. *Id.* at 3.

276. *Id.* at 5.

277. *Id.*

278. *Hearings, supra* note 2, at 11–13.

279. *Id.* at 14.

280. ORSZAG & FONTAINE, *supra* note 86, at 24.

281. See, e.g., *CBO Releases Score of Homeowners' Defense Act (H.R. 2555)*, NAT'L ASS'N OF PROF'L INS. AGENTS (June 9, 2010), <http://www.pianet.com/NewsCenter/BizPolitics/06-09-10-07.htm> [hereinafter, *CBO Releases Score*]; see also Arin Greenwood, *High Price Tag on Beach House Bailout*, FIRE POLICY NEWS, HEARTLAND.ORG (June 21, 2010), <http://www.heartland.org/environmentandclimate->

Budget Office report issued in 2010 supports these figures, estimating that in the first year of the HDA's existence, state programs would seek \$7 billion in reinsurance, and opining that the premiums the federal government would charge for the program will be insufficient to compensate the government fully for the coverage offered.²⁸² Opponents have seized upon this report to support the argument that "natural catastrophe risk should be placed in the insurance market, not on the taxpayers."²⁸³ However, as discussed above, the taxpayers are *already* footing the bill for natural catastrophes. After Hurricane Katrina, the federal government commenced a bailout that had amassed to \$50 billion and counting as of 2008.²⁸⁴ A more proactive approach may, in fact, save taxpayer dollars in the long run.

The benefits to all states and consumers, above and beyond those listed, are manifold and impossible to estimate at this point. One study puts the possible savings to consumers at \$11 billion annually.²⁸⁵ Other indirect benefits include those from loss-mitigation strategies such as retrofitting, improved land use policies, and stricter building codes.²⁸⁶ All told, the savings in every respect will likely be significant. But most importantly for our purposes, the HDA will help kill two birds with one stone: Along with the judicial measures I have already discussed, adoption of the HDA will bulwark the weaknesses in California's approach to the concurrent causation question and the problem of catastrophe insurance, thereby establishing a workable solution for other states to consider.

news.org/article/27850/CBO_High_Price_Tag_on_Beach_House_Bailout.html. Opponents to the HDA have dubbed it, colorfully, "the Beach House Bailout." See, e.g., Greenwood, *supra*. Like most political rhetoric, the title is misleading, given that every state in the country, coastal and land-locked alike, has declared a natural disaster between eight and eighty-four times since 1953. See *Annual Major Disaster Declarations Totals*, FEMA, http://www.fema.gov/news/disaster_totals_annual.fema (last visited Feb. 2, 2011) (providing a list of the number of all natural disasters declared from 1953–2010 in each of the U.S. states and territories, along with detailed information about the damage incurred). Notably, Oklahoma ranks third in number of natural disasters during that period, at sixty-six. *Id.* U.S. natural disasters are demonstrably not limited to beach front property; rather, a map of presidential disaster declarations over the last four decades "reflect[s] the broad geographic distribution and human impact of earthquakes, floods, hurricanes, landslides, tsunamis, volcanoes and wildfires." U.S. GEOLOGICAL SURVEY, FACT SHEET 2007-3009: NATIONAL HAZARDS—A NATIONAL THREAT (2007).

282. CONG. BUDGET OFFICE, COST ESTIMATE: H.R. 2555 HOMEOWNERS' DEFENSE ACT OF 2010 I, 4 (2010).

283. See, e.g., *CBO Releases Score*, *supra* note 281.

284. See *supra* note 85 and accompanying text.

285. *Id.* at 22–23.

286. *Id.* at 23.

CONCLUSION

This Note has examined and proposed a solution to the problems presented by natural disasters and insurers' corresponding attempts to immunize themselves from liability. At the judicial level, the California courts should strictly curtail the effect of recent cases, such as *Julian*, which have undermined California's approach to concurrent causation. At the legislative level, Congress should reintroduce and adopt the Homeowners' Defense Act of 2009. This approach presents a workable example for other disaster-prone states and will serve to assuage the concerns of courts, insurers, taxpayers, and homeowners alike.
